No. 84-114

In the Supreme Court of the United States

OCTOBER TERM, 1984

KENNETH R. AMIDON, DONALD H. LAJOIE AND JAMES M. ELWOOD, PETITIONERS

v.

CASPAR WEINBERGER, SECRETARY OF DEFENSE, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether, in determining that "the position of the United States" was "substantially justified" so as to preclude an award of attorneys' fees under the Equal Access to Justice Act, 28 U.S.C. 2412(d)(1)(A), the court of appeals correctly looked to the government's position in this lawsuit rather than to its prelitigation actions that precipitated petitioners' habeas corpus petitions.

2. Whether the court of appeals applied the correct standard of appellate review in this case.

3. Whether, in determining that the position of the United States was substantially justified, the court of appeals was required to evaluate arguments raised by petitioners in the district court but not decided by that court.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-17a) is reported at 730 F.2d 949. The oral opinion and orders of the district court (Pet. App. 18a-26a) are unreported. The opinion of the court of appeals in the underlying litigation (Pet. App. 46a-56a) is reported at 677 F.2d 17. The district court's opinion and order in the underlying litigation (Pet. App. 27a-45a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on January 13, 1984, and a petition for rehearing was denied on March 2, 1984. The petition for a writ of certiorari was filed on May 31, 1984. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. In March 1980, petitioners were members of the Navy stationed on active duty in Rota, Spain. At that time, all three petitioners were implicated in the death of a fellow sailor. Because of statutory speedy trial requirements, the Navy was unable to court-martial petitioners for their alleged involvement in the murder.[1] The Navy believed, however, that Spain retained jurisdiction to bring criminal proceedings against petitioners pursuant to the terms of an agreement with the United States. Agreement in Implementation of the Treaty of Friendship and Cooperation Between Spain and the United States of America of January 24, 1976, 27 U.S.T. 3098 *et seq.*, T.I.A.S. No. 8361 [hereafter cited as *Agreement*]. The Navy also believed that it was obligated under the *Agreement* to ensure petitioners' availability for any legal proceedings Spain might choose to bring.[2] Accordingly, when petitioners' periods of active duty were due to expire, the Navy ordered them involuntarily extended in order to preserve Spain's option to prosecute. Pet. App. 3a, 29a, 49a-50a.

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[1]Under Article 10 of the Uniform Code of Military Justice, 10 U.S.C. 810, a member of the military who is charged with an offense punishable by court-martial and who is arrested or confined prior to trial ordinarily must be brought to trial within 90 days of his initial confinement. See *United States* v. *Burton*, 21 C.M.A. 112, 44 C.M.R. 166 (1971). In petitioners' cases, the military courts held that the Navy's need to complete another court-martial proceeding being held in Rota prior to trying petitioners did not toll the running of the 90-day period for purposes of compliance with Article 10. See Pet. App. 28a-29a, 48a-49a.

[2]Under the *Agreement*, the United States has "primary jurisdiction" over any offense committed by an American serviceman against another American serviceman. Art. XV, § 3.a(1), 27 U.S.T. 3113-3114. Spain, however, retains the authority to prosecute the serviceman if the United States either elects not to prosecute or brings criminal proceedings that do not result in a conviction, an acquittal, or a pardon. Art. XXII, 27 U.S.T. 3119.

Petitioners sought writs of habeas corpus in the United States District Court for the Eastern District of Virginia, challenging the Navy's involuntary extension of their active duty enlistments. Initially, the district court ordered petitioners' return to the United States pending resolution of their habeas corpus petitions. Thereafter, the court granted petitioner Amidon's petition for habeas corpus. The court held that the *Agreement*'s requirement that the United States retain custody over "a member of the United States Personnel in Spain * * * over whom Spanish jurisdiction is to be exercised" (Art. XVIII, § 3, 27 U.S.T. 3116) did not apply to petitioner Amidon because, as of the date his enlistment expired, Spain had not made a decision to prosecute. Pet. App. 27a-45a. Two months later, when the Navy extended petitioner Lajoie's active duty enlistment obligation, the district court granted his habeas corpus petition as well, relying on its prior decision in *Amidon* (Pet. 16).[3]

The court of appeals affirmed the district court's grants of habeas corpus relief for petitioners Amidon and Lajoie (Pet. App. 46a-56a). In so doing, however, the court of appeals relied upon a different theory than that employed by the district court. Specifically, the court of appeals held (*id.* at 51a-56a) that the phrase "legally subject to detention" in Article XVIII, § 3, of the *Agreement*, 27 U.S.T. 3116, required the existence of independent authority to extend petitioners' enlistments and that a provision of the Navy's personnel manual that had been utilized to effectuate the extensions was invalid because it was inconsistent with published Naval regulations.

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[3]Thereafter, on October 27, 1981, the Prosecutor General of Spain advised the United States that Spain had decided to exercise its jurisdiction to prosecute petitioners. On February 2, 1982, when petitioner Elwood's period of active duty was due to expire, the Navy extended it unilaterally. Like petitioners Amidon and Lajoie, petitioner Elwood sought and ultimately obtained habeas corpus relief.

2. Following the court of appeals' decision on the merits, petitioners sought attorneys' fees under the Equal Access to Justice Act (EAJA), 28 U.S.C. 2412(d). The district court granted petitioners' fee applications, rejecting the government's argument that its position had been "substantially justified" (Pet. App. 24a-26a). The court concluded that the "substantial justification" exception was inapplicable "where the reason for the litigation flows from some prior negligent handling of a case" (*id.* at 24a), apparently referring to the Navy's handling of the court-martial proceedings.[4]

On appeal, the court of appeals reversed the attorneys' fee awards, holding that the government's position in the litigation had been "substantially justified" (Pet. App. 1a-17a). Reaffirming the rule established in *Tyler Business Services, Inc.* v. *NLRB*, 695 F.2d 73 (4th Cir. 1982), the court of appeals first held that it is the government's position in the litigation, rather than its prelitigation actions, that must be substantially justified in order to preclude an award of attorneys' fees (Pet. App. 10a-11a). The court then determined that both the factual and legal bases of the government's case were the same — *i.e.*, a belief that the United States was obligated under the *Agreement* to hold petitioners for a reasonable period of time until Spain could determine whether to assert jurisdiction over them (*id.* at 12a-13a). Assessing the reasonableness of that interpretation of the *Agreement* (as well as of certain implementing regulations), the court concluded that it was "reasonable, though not persuasive, on its face" (*id.* at 13a). The court noted that

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[4]The district court also rejected the government's argument that the fee applications of petitioners Amidon and Lajoie were untimely because they were filed more than 30 days after the entry of judgment. See 28 U.S.C. 2412(d)(1)(B). Because it reversed on other grounds, the court of appeals did not reach this issue.

the Department of State had supported the Navy's interpretation of the *Agreement* and that the court of appeals' contrary reading of the *Agreement* was "not self evident" since it was based on considerations that had not occurred to either the parties or the district court (*id.* at 14a-15a).

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court. Petitioners urge the Court to resolve the conflict in the circuits over the meaning of the phrase, "position of the United States," as used in Section 2412(d)(1)(A) of EAJA. For the reasons stated in our brief in opposition in *Jarboe-Lackey Feedlots, Inc.* v. *United States*, No. 83-1916 (filed July 19, 1984), review of that issue is not warranted.[5] Nor do the other questions presented warrant review by this Court.[6]

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[5]We are furnishing a copy of our brief in opposition in No. 83-1916 to counsel for petitioners. The Court recently declined to review another decision raising the same issue. *Spencer* v. *NLRB*, 712 F.2d 539 (D.C. Cir. 1983), cert. denied, No. 83-981 (Apr. 16, 1984). In addition to the cases cited in our brief in opposition in No. 83-1916 (at 9-10 & n.5), we note that the Eighth and Eleventh Circuits have recently rendered decisions on the issue. The Eighth Circuit has adopted the interpretation of "position of the United States" advocated by petitioners (*Iowa Express Distribution, Inc.* v. *NLRB*, No. 83-1589 (July 11, 1984)), and the Eleventh Circuit has adopted the interpretation urged by the government (*Ashburn* v. *United States*, No. 83-7467 (Aug. 28, 1984)). The Eighth Circuit's discussion appears to be dictum, however, since the court also "observe[d] that the government's position has been consistent both at the prelitigation and litigation levels" (slip op. 7). As we note in the text, the same observation is applicable to nearly all EAJA cases, providing yet another reason why this Court's review is unnecessary.

[6]Review is unwarranted for the additional reasons that two of the three petitioners filed untimely fee applications (see page 4 note 4, *supra*), and EAJA does not apply to habeas corpus actions in any event. *Boudin* v. *Thomas*, 732 F.2d 1107, 1111-1115 (2d Cir. 1984).

1. a. Further review of the "position of the United States" issue is unwarranted because resolution of the conflict would not affect the result in this case. Petitioners have not demonstrated that the rule they seek would have changed the outcome here. As is true in all but a handful of cases, the government's litigation position was simply a defense of the underlying action that precipitated the court proceeding; accordingly, petitioners' entitlement to attorneys' fees would not be affected by any distinction between the government's litigation position and the underlying agency action. See, *e.g.*, *Houston Agricultural Credit Corp.* v. *United States*, 736 F.2d 233, 235 (5th. Cir. 1984); *Spencer* v. *NLRB*, 712 F.2d 539, 552 (D.C. Cir. 1983), cert. denied, No. 83-981 (Apr. 16, 1984). The government's justification for involuntarily extending petitioners' enlistments and its defense of that action were identical, *i.e.*, the Navy's belief, supported by the State Department, that the *Agreement* required it to hold petitioners for a reasonable period of time while the Spanish authorities decided whether to prosecute them. Accordingly, this is an inappropriate case for this Court to consider whether the "position of the United States" should be other than the government's litigation position.[7]

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[7]In our view, it is quite clear that the only prelitigation action of the Navy pertinent to this case was the involuntary extension of petitioners' periods of enlistment. It was that action that provided the sole basis for the filing of petitioners' habeas corpus petitions. The district court, however, appears to have considered the Navy's allegedly "negligent handling" of petitioners' court-martial proceedings as the relevant prelitigation action (see Pet. App. 24a-25a). The reasons for the Navy's inability to commence court-martial proceedings against petitioners within the 90-day period required by 10 U.S.C. 810 have nothing to do with the issues raised by petitioners in their habeas corpus petitions challenging the involuntary extension of their periods of enlistment. Accordingly, the district court's focus on the court-martial proceedings as the relevant prelitigation action was plainly wrong.

b. As we explained in our brief in opposition in *Jarboe-Lackey Feedlots, Inc.* v. *United States, supra*, Congress is aware of the issue raised by petitioners and is actively considering legislation that would define "position of the United States" in the statute itself. Section 2412(d) of EAJA will automatically expire on October 1, 1984, unless extended by Congress. 28 U.S.C. 2412 note. Bills are pending in the Senate and the House to extend the Act, and both include provisions that define "position of the United States." It is reasonable to assume that Congress will take action on the pending bills before the statutory expiration date. Thus, by the start of this Court's next Term, Congress will have either allowed the Act to expire or reauthorized it in a form that may well include a statutory definition of "position of the United States." In either event, the correct interpretation of the current statute would have become a matter of extremely limited importance. In these circumstances, we suggest that the Court should defer to Congress.

2. Petitioners' suggestion (Pet. 30-36) that further review is warranted because the court of appeals improperly engaged in fact-finding merits little discussion. Petitioners assert (Pet. 33, 34-35) that there were material facts in dispute in this case, but they fail to identify any such facts. In truth, there are none. As the court of appeals noted (Pet. App. 13a), the factual and legal bases of the government's position at all stages of this litigation were identical, *i.e.*, the Navy's belief that the *Agreement* obligated it to hold petitioners for a reasonable period of time, following dismissal of the court-martial proceedings, until Spain decided whether it would prosecute them. Accordingly, there were no factual issues requiring remand to the district court. Other circuits considering the question have recognized that whether a particular interpretation of the law is " 'plausable or colorable,' " and hence "substantially justified" within the meaning of EAJA, is a purely legal question that

may be determined de novo by an appellate court. *Boudin* v. *Thomas*, 732 F.2d 1107, 1117 (2d Cir. 1984) (quoting *Spencer* v. *NLRB*, 712 F.2d at 563).[8]

3. Finally, petitioners contend (Pet. 36-38) that the court of appeals' failure to require the government to show that its position was "substantially justified" with respect to certain issues raised in but not decided by the lower courts conflicts with decisions of the Third and Ninth Circuits. This alleged conflict simply does not exist.[9] Moreover, petitioners' failure to raise this point before the court of appeals,[10] as well as

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[8]Petitioners' reliance (Pet. 34) on *United States* v. *Cockrell*, 720 F.2d 1423 (5th Cir. 1983), is plainly misplaced. *Cockrell*, which did not arise under EAJA, involved a claim of ineffective assistance of counsel and the appropriate standard of review of the district court's resolution of that issue, including its judgment as to the reasonableness of certain strategic decisions made by counsel in litigation. 720 F.2d at 1426. Here, however, determining the reasonableness of the government's litigation position required the court of appeals to do no more than decide whether the Navy's interpretation of its obligations under an international agreement was "plausible or colorable" — a task an appellate court unquestionably is qualified to perform in the first instance. *Boudin* v. *Thomas*, 732 F.2d at 1117.

[9]In *Goldhaber* v. *Foley*, 698 F.2d 193 (3d Cir. 1983), and *Southern Oregon Citizens Against Toxic Sprays, Inc.* v. *Clark*, 720 F.2d 1475 (9th Cir. 1983), cert. pending on other grounds, No. 84-267, the Third and Ninth Circuits held that under EAJA the government is chargeable for attorneys' fees attributable only to those discrete issues as to which its position was not substantially justified. In both cases, however, the district courts actually had adjudicated each of the issues for which fees were being sought. In the instant case, on the other hand, the district court — and therefore the court of appeals — concerned itself with only one dispositive issue. And in *Cinciarelli* v. *Reagan*, 729 F.2d 801, 807 (D.C. Cir. 1984), also relied upon by petitioners (Pet. 38), the issue on which fees were ultimately awarded was not decided by the district court only because the case was settled before any decision could issue. In these circumstances, neither *Cinciarelli* nor the other decisions cited by petitioners can be said to conflict with the decision below.

[10]Petitioners' only reference to this issue in the court of appeals consisted of a single sentence: "In order to sustain [the government's] legal position, all of the legal challenges raised thereto in this litigation

the fact that the decision below does not address the issue, strongly suggests that review by this Court would be inappropriate. See *NLRB* v. *Sears, Roebuck & Co.*, 421 U.S. 132, 163-164 (1975); *Adickes* v. *S.H. Kress & Co.*, 398 U.S. 144, 147 n.2 (1970).[11]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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would have to be addressed." Br. for Appellees 17-18. This statement was unsupported by any authority and was located in the introduction to petitioners' discussion of the Navy's interpretation of the *Agreement* and its implementing regulations — the only legal issue that *was* decided in this case.

[11]In any event, the principle petitioners advocate is of dubious merit, since it would require appellate courts to decide issues never briefed by the parties in the abstract and advisory context of collateral attorneys' fee litigation.

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